

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALISHA BAILEY)	
Claimant)	
)	
VS.)	
)	
STAFFMARK INVESTMENTS)	
Respondent)	Docket No. 1,017,779
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the August 30, 2004 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury did not arise out of and in the course of employment. Therefore, the ALJ denied benefits. The ALJ concluded claimant's activity in climbing onto boxes and sitting down was neither horseplay nor an authorized break from work activity. The ALJ classified claimant's activity as simply an unauthorized break from work and her injury when she fell did not arise out of her employment.

The claimant requests review of whether the accidental injury arose out of and in the course of employment. Claimant argues during periods of inactivity the supervisors allowed employees to sit on boxes and because that had been allowed her injury falling off a box should be compensable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant, an employee of respondent, was working in the Coleman warehouse and her duties included loading and unloading trucks. After trucks were loaded or unloaded the claimant was then required to sweep the floors.

Claimant noted that because there had not been many trucks to load or unload she had primarily been sweeping for three days. Because she got bored she climbed up on some boxes approximately four feet off the floor and sat down. As she started to climb down she stepped on a box which fell over and claimant fell to the floor injuring her back.

Claimant testified that she knew she should not have been on the boxes.

Q. You discussed the accident with Shannon and Raquel, correct?

A. Yes.

Q. And you told them that you knew that you should not have been on those boxes, didn't you?

A. Yes.¹

But she also testified she had never been told she could not sit on the boxes and it was common for employees to take a break from sweeping and sit on the boxes as she had done. And that her supervisor would allow that activity and on occasion see the employees get on the boxes.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."³

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

¹ P.H. Trans. at 15.

² K.S.A. 44-501(a).

³ K.S.A. 2003 Supp. 44-508(g).

⁴ *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

⁵ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, rev. denied 238 Kan. 878 (1985).

Claimant argues her testimony was uncontradicted that employees were allowed to take a break and sit on the boxes as she had done. But claimant's own testimony was contradictory and inconsistent as she further agreed she knew that she should not have been sitting on the boxes. Moreover, her testimony indicated the reason she climbed onto the boxes and sat down was because she was bored rather than taking an authorized break from work.

Based upon the record compiled to date, the Board finds claimant failed to meet her burden of proof to establish she suffered accidental injury arising out of her employment and affirms the ALJ's Order.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁶

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 30, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2004.

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Edward D. Heath Jr., Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ K.S.A. 44-534a(a)(2).